WASHINGTON
LEGISLATIVE OFFICE

American Civil Liberties Union

Testimony at an Oversight Hearing on the

USA PATRIOT Act of 2001: Section 505 (National Security Letters) and Section 804 (Extraterritorial Criminal Jurisdiction)

and the

Material Witness Statute

Before the

Subcommittee on Crime, Terrorism and Homeland Security

of the

House Judiciary Committee

Submitted by

Gregory T. Nojeim
Acting Director, Washington Legislative Office

and Timothy H. Edgar
National Security Policy Counsel

May 26, 2005

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

American Civil Liberties Union
Testimony at an Oversight Hearing on the USA PATRIOT Act of 2001: Section 505 (National Security Letters) and Section 804 (Extraterritorial Criminal Jurisdiction) and the Material Witness Statute before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee
Submitted by Gregory T. Nojeim, Acting Director, Washington Legislative Office and Timothy H. Edgar, National Security Policy Counsel

May 26, 2005

Chairman Coble, Ranking Member Scott and Members of the Subcommittee:

I am pleased to appear before you today on behalf of the American Civil Liberties Union and its more than 400,000 members, dedicated to preserving the principles of the Constitution and Bill of Rights. This is an oversight hearing on sections of the USA PATRIOT Act of 2001 expanding national security letter powers and extraterritorial jurisdiction for federal criminal prosecutions,[1] as well as the very important topic of the Justice Department's use of the material witness statute.[2]

This statement's main focus is on national security letters and material witness detention. While these powers are not set to expire at the end of the year, their unrestricted use poses a serious threat to basic civil liberties and should be the subject of this subcommittee's careful scrutiny. The statement also briefly addresses extraterritorial jurisdiction.

Secret Records Searches Without Judicial Review, Probable Cause or an Ability to Challenge: National Security Letters

Perhaps no sections of the Patriot Act have become more controversial than the sections allowing the government secretly to obtain confidential records in national security investigations – investigations "to protect against international terrorism or clandestine intelligence activities."

National security investigations are not limited to gathering information about criminal activity. Instead, they are intelligence investigations designed to collect

[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

[2] 18 U.S.C. § 3144. The material witness law provides in full:

> Release or detention of a material witness. -- If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

information the government decides is needed to prevent – "to protect against" – the threat of terrorism or espionage. They pose greater risks for civil liberties because they potentially involve the secret gathering of information about lawful political or religious activities that federal agents believe may be relevant to the actions of a foreign government or foreign political organization (including a terrorist group).

The traditional limit on national security investigations is the focus on investigating foreign powers or agents of foreign powers. Indeed, the "foreign power" standard is really the only meaningful substantive limit for non-criminal investigations given the astonishing breadth of information government officials might decide is needed for intelligence reasons. The Patriot Act eliminated this basic limit for records searches, including the FBI's power to use a "national security letter" to obtain some records without any court review at all.

Section 505 of the Patriot Act expanded the FBI's power to obtain some records in national security investigations without any court review at all. These "national security letters" can be used to obtain financial records, credit reports, and telephone, Internet and other communications billing or transactional records. The letters can be issued simply on the FBI's own assertion that they are needed for an investigation, and also contain an automatic and permanent nondisclosure requirement.

Although national security letters never required probable cause, they did require, prior to the Patriot Act, "specific and articulable facts giving reason to believe" the records pertain to an "agent of a foreign power." The Patriot Act removed that standard.

As a result, a previously obscure and rarely used power can now be used far more widely to obtain many more records of American citizens and lawful residents. Because the requirement of individual suspicion has been repealed, records powers may now be used to obtain entire databases of private information for "data mining" purposes – using computer software to tag law abiding Americans as terrorist suspects based on a computer algorithm.

In *Doe* v. *Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), a federal district court struck down a "national security letter" records power expanded by the Patriot Act, agreeing with the ACLU that the failure to provide any explicit right for a recipient to challenge a national security letter search order violated the Fourth Amendment and that the automatic secrecy rule violated the First Amendment. The case is now on appeal before the United States Court of Appeals for the Second Circuit.

There has been some confusion about whether *Doe v. Ashcroft* struck down a provision of the Patriot Act. In fact, *Doe v. Ashcroft* struck down, in its entirety, 18 U.S.C. § 2709(b), the national security letter authority for customer records of communications service providers, as amended by section 505(a) of the Patriot Act. The court referred repeatedly to the Patriot Act in its opinion. To be

clear, the court invalidated *all of section 505(a) of the Patriot Act*.[3] It is simply inaccurate to imply that the court's decision was unrelated to the Patriot Act, or that it did not strike down a provision of the Patriot Act. If the court's decision is sustained on appeal, section 505(a) of the Patriot Act will no longer have any force or effect.[4]

National security letters can be used to obtain sensitive records relating to the exercise of First Amendment rights. A national security letter could be used to monitor use of a computer at a library or Internet café under the government's theory that providing Internet access (even for free) makes an institution a "communications service provider" under the law.

While national security letters cannot be issued in an investigation of a United States citizen or lawful permanent resident if the investigation is based "solely" on First Amendment activities, this provides little protection. An investigation is rarely, if ever, based "solely" on any one factor; investigations based in large part, but not solely, on constitutionally protected speech or association are implicitly allowed. An investigation of a temporary resident can be based "solely" on First Amendment activities, and such an investigation of a foreign visitor may involve obtaining records pertaining to a United States citizen. For example, a investigation based solely on the First Amendment activities of an international student could involve a demand for the confidential records of a student political group that includes United States citizens or permanent residents.

The government defends national security letters as analogous to a administrative subpoenas, which they point out do not require probable cause and can be issued without prior review by a judge. As explained above, national security letters are dramatically different from both administrative and grand jury subpoenas because they provides no explicit right to challenge and contain an automatic, permanent gag order that even the Attorney General concedes should be amended to ensure it permits conversations with attorneys.

Moreover, this argument fundamentally misunderstands the difference between foreign intelligence investigations, criminal investigations, and administrative agency regulation, and the impact of that difference on First Amendment freedoms. Foreign intelligence investigations are domestic investigations of the activities of foreign governments or organizations, including foreign terrorist organizations. Foreign intelligence investigations may involve investigation of criminal activities, such as espionage or terrorism, but may also involve

---

[3] Please see attachment A illustrating precisely what the court in *Doe v. Ashcroft* struck down.

[4] While the use of national security letters are secret, the press has reported a dramatic increase in the number of letters issued, and in the scope of such requests. For example, over the 2003-04 holiday period, the FBI reportedly obtained the names of over 300,000 travelers to Las Vegas, despite casinos' deep reluctance to share such confidential customer information with the government. It is not clear whether the records were obtained in part with a national security letter, with the threat of such a letter, or whether the information was instead turned over voluntarily or to comply with a subpoena.

intelligence gathering for foreign policy or other purposes involving lawful activities. The guidelines for conducting foreign intelligence investigations (including what level of suspicion is required for certain intrusive techniques) are classified.

As Justice Powell, writing for the Supreme Court in a landmark case involving intelligence gathering, observed:

> National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. . . History abundantly documents the tendency of Government--however benevolent and benign its motives--to view with suspicion those who most fervently dispute its policies. . . .
>
> The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power.[5]

Moreover, as a result of section 203 of the Patriot Act, information properly obtained in a criminal investigation of terrorism (including information obtained with a grand jury subpoena) can be freely shared with intelligence agents. National security letters are an entirely different, and more intrusive, power – a power for intelligence agents to obtain highly personal records unbounded by any need to show relevance to any criminal investigation.

The administration has disclosed little useful information about the use of national security letters. For example, in response to repeated requests for information about the use of national security letters under the Freedom of Information Act, the government has responded with page after page of heavily redacted documents that do not provide the public with any way to judge how the power is being used.[6]

The disclosure of information about how often a different controversial intelligence records power (section 215 of the Patriot Act) has been used, and the types of records it has been used to obtain, calls into serious question the government's longstanding position that similar information about the use of national security letters is properly kept secret.

We do not ask that you repeal section 505 of the Patriot Act. Rather, we ask that you restore the "agent of a foreign power" requirement and that you amend the statute to time limit the gag, exempt attorney-client communications from it, and allow for court challenges. If these changes are made to the NSL statute, they would satisfy the court that struck down that statute under the First and the Fourth Amendment.

The SAFE Act ("Security and Freedom Ensured Act," H.R. 1526) would subject section 505 to the Patriot Act's sunset provision, thus restoring the requirement

---

[5] *United States v. United States District Court*, 407 U.S. 297, 313-14 (1972).

[6] Please see attachment B, a blacked-out list of NSL requests provided to the ACLU in response to a request under FOIA. Even the total number of NSLs issued is redacted.

of "specific and articulable facts giving reason to believe" the records "pertain to a foreign power or an agent of a foreign power" for national security letters. Restoring this requirement is needed to ensure section 505 of the Patriot Act is not used to obtain the personal records of ordinary Americans.

The Senate version of the SAFE Act (S. 737) makes additional improvements which should be added to the House version should the SAFE Act move forward to committee consideration. S. 737 makes explicit the right to file a motion to quash the national security letters because they are unreasonable, contrary to law, or seek privileged information. The Senate bill also sets standards for a judicially-imposed, temporary secrecy order that can be challenged by the recipient of a national security letter. Finally, the Senate bill provides a right to notice, and an opportunity to challenge, before information from a FISA records search or national security letter search can be used in a court proceeding.

Secret Detention Without Charge: The Misuse of the Material Witness Statute

This subcommittee's oversight of the Justice Department's use of the material witness statute to arrest and detain scores of people without charge is long overdue. Since September 11, the abuse of the material witness law has thrust many into a world of secret detention, secret evidence, and baseless accusations of terrorist links. The prolonged incarceration of hundreds of immigrants on routine visa violations until cleared by the FBI of presumed terrorist connections is well documented.[7] Less well known is the misuse of the federal material witness law to arrest and imprison scores of people – including United States citizens – indefinitely without criminal charges.

The Justice Department has tried to keep hidden its use of the material witness law, refusing to respond to Congressional inquiries and keeping courtroom doors closed and material witness cases off court dockets. This testimony draws from results of extensive research by the ACLU and Human Rights Watch (HRW), which will be released shortly in a joint report detailing the experiences of scores of individuals whom the federal government arrested as material witnesses in connection with its anti-terrorism investigations.

That report will identify serious, systemic abuses of civil liberties that occurred as a direct result of the Justice Department's policy of abusing the material witness law for purposes Congress never intended, and will make detailed recommendations for corrective action. The report is based on interviews, affidavits, and court records of scores of individuals who were detained as material witnesses.

---

[7] American Civil Liberties Union, *America's Disappeared: Seeking International Justice for Immigrants Detained after September 11* (January 2004); Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September11 Detainees* (August 2002); U.S. Department of Justice, Office of the Inspector General (OIG), *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003).

The material witness statute, 18 U.S.C. § 3144, comprises a single paragraph that simply states if it appears from an affidavit that a witness has testimony that is "material" to a "criminal proceeding," the witness may be arrested and held "if it is shown that it may become impracticable to secure the presence of the person by subpoena." A deposition is required, instead of detention, if a deposition would "adequately" secure testimony and if "further detention is not necessary to prevent a failure of justice."

Congress enacted the material witness law to enable the government, in narrow circumstances, to secure the testimony of witnesses who might otherwise avoid testifying in a criminal proceeding. If a court accepts an affidavit that says a person has information "material" to a criminal proceeding and is otherwise unlikely to appear, the witness can be locked up until he testifies or is deposed.

Since September 11, however, the Department of Justice has misused the law for a very different purpose: to secure the indefinite incarceration of those it wanted to investigate as possible terrorist suspects. This allowed the government to evade public scrutiny and to avoid the constitutional protections guaranteed to suspects, including probable cause to believe the individual committed a crime and time-limited detention.

The report will show that the post-September 11 material witnesses were incarcerated for periods ranging from a few days to upwards of a year. Many spent at least two months in jail. Witnesses were typically held round the clock in solitary confinement, subjected to the harsh and degrading high security conditions typically reserved for the most dangerous inmates accused or convicted of the most serious crimes. Indeed, they were often arrested at gunpoint in front of families and neighbors and transported to jail in handcuffs; any time they were taken out of their cells they were handcuffed and shackled. They were interrogated without counsel about their own alleged wrongdoing.

While the government has contended that almost all material witnesses had useful information, our report will show that a large number of witnesses were never brought before a grand jury or court to testify. More tellingly, in repeated cases the government has now apologized for arresting and incarcerating the "wrong guy." The material witnesses were victims of the federal investigators and attorneys who were to quick to jump to the wrong conclusions, relying on false, unreliable and irrelevant information. By evading the probable cause requirement for arrests of suspects, the government made numerous mistakes.

- **Brandon Mayfield** - When armed agents took Brandon Mayfield, a lawyer in Oregon, into custody in May 2004 on the basis of a sealed material witness warrant, a criminal indictment seemed likely to follow. The FBI appeared to believe that Mr. Mayfield—a U.S. citizen, veteran of the U.S. Army and a married father of three—himself was a perpetrator of the bombing because their experts claim to have made a "100% positive identification" of Mr. Mayfield's fingerprint as being the print found on a bag of detonators found near the Madrid bombing site. For two weeks, the government held Mr. Mayfield, mostly in maximum

security conditions, and urged in closed court proceedings that Mr. Mayfield was involved with the crime. Prosecutors threatened him with capital charges and refered to him as a target in court papers—even though there was no evidence that Mr. Mayfield had traveled to Spain, or otherwise had been out of the country for more than ten years. These logical gaps were explained when three weeks after his arrest, the Spanish government apprehended an Algerian man whose fingerprint accurately matched the print found near the site, after weeks of the Spanish launching protests to the U.S. government that Mr. Mayfield's fingerprint was not a match. The Justice Department has since apologized to Mr. Mayfield and has issued an internal report sharply criticizing the FBI investigation and fingerprint match.

- **Al Badr al-Hazmi** - In the early morning of September 12, 2001, five FBI agents visited the house of Dr. Albader al-Hazmi, a medical doctor doing his residency in San Antonio, Texas, who lived with his wife and young children. The government based its arrest of Dr. al-Hazmi on the fact that he shared the last name as one of the hijackers and had been in phone contact months earlier with someone at the Saudi Arabian embassy with the last name "bin Laden." After the government held Dr. al-Hazmi in solitary confinement in Texas and New York for two weeks, and restricted his lawyers' access to him, Dr. al-Hazmi was released without ever testifying. The harrowing experience prompted Dr. al-Hazmi to send his wife and children back to Saudi Arabia. Although he was cleared of any involvement with the September 11 investigation, the government never unsealed his records or apologized to Dr. al-Hazmi.

These examples demonstrate the pattern of the abuse of the law to hold a suspect to make an end-run around establishing probable cause, as well as the dangers of circumventing criminal safeguards which protect both rights and good government. These cases represent only two of a much larger series of mistakes the government made in its secret arrests of material witnesses.

In part, the abuses resulted from an absence of real judicial scrutiny. Judicial scrutiny of arrest warrants was frustrated in part because the Justice Department sought the arrest of most of the witnesses in connection with grand jury investigations – although material witness arrests, prior to September 11, had been used very rarely in grand jury investigations. Because the government has broad powers in grand jury investigations, courts often deferred to the government's requests for testimony. Moreover, the government urged that witnesses urgently needed to remain detained for national security reasons.

Public proceedings and records of arrests and detentions are another criminal justice safeguard that was not available for the post-September 11 material witnesses. Historically, proceedings about whether to detain or release material witnesses – *including proceedings involving whether to detain grand jury witnesses* – have been public under the long-standing American principle that secret arrests are odious to a democracy. Yet the Justice Department insisted on conducting proceedings behind closed doors and sealing virtually all documents

connected with the witnesses' arrests and detentions, including warrants, affidavits, transcripts, legal briefs, and court rulings.

Although the Justice Department claimed some witnesses preferred not to speak publicly, they nevertheless insisted on obtaining orders gagging witnesses' attorneys and family members, barring reporters from meeting with witnesses, and keeping witnesses off the public docket altogether - so as to deny the basic fact of their incarceration. For example, Brandon Mayfield's family members and lawyers were gagged, and Dr. Al-Hazmi's court proceedings were not publicly docketed.

Grand jury rules required such secrecy, the Justice Department maintained, but those rules only prohibit revealing what happens inside a grand jury room. Prior to September 11, the Justice Department did not insist on secrecy; detention hearings for material witnesses in grand jury proceedings were public. Had the proceedings been open, the government's mistakes would have come to light far more quickly and the witnesses released much sooner.

While material witnesses (unlike immigration detainees) have a right to court-appointed counsel if they cannot afford an attorney, the Justice Department prevented attorneys for the material witnesses from being able to adequately protect their clients' interests. It often refused to give the witnesses or their attorneys a copy of the affidavit supporting the arrest, or put constraints on their ability to review this crucial document. Some were even restricted from revealing the contents of the affidavits to their clients – which made preparing an effective response next to impossible.

Attorneys were not able to protect their clients in other ways, as well, most notably while they were interrogated. While calling them witnesses, the government clearly viewed most of these individuals as suspects. Nevertheless, federal agents often refused to tell them of their right to remain silent or to have an attorney present at their custodial interrogations; interviewed witnesses without counsel; and failed to honor witnesses' requests for an attorney or stop interrogations when witnesses did ask for counsel. In many of the cases where witnesses later faced criminal charges, the Justice Department based the charges on statements the witnesses – including unsworn statements made with no attorney present – made during such interrogations.

After weeks and months of detention without charge had passed – in some cases without the so-called "witness" ever being brought before a grand jury – some courts' patience was exhausted. The result varied:

- Many were released, and in more than a dozen cases, the Justice Department apologized for arresting them in the first place;

- Some were charged with criminal offenses unrelated to terrorism (including, in some cases, the offense of allegedly lying to the grand jury or even making false, unsworn statements during interrogations);

- Some non-citizens left the country, either voluntarily or after being ordered deported for immigration violations unrelated to terrorism;

- Two (including one American citizen) were designated "enemy combatants" and held in military brigs without charges, trial or access to counsel;

- A small minority were charged with terrorism crimes and were convicted, pled guilty, or continue to await trial.

Apologies are poor compensation for loss of liberty. Material witnesses were often arrested in highly public settings, with little chance to clear their name because all substantive proceedings were closed. All the information the public learned of these arrests was what the government chose to leak. Even after their release, some continued to face lasting repercussions to their reputations, businesses, families and community lives.

Because of the serious abuses that have resulted from the material witness law, Congress must take action that will ensure that the investigation and arrest of persons suspected of having material information to an investigation are conducted with regard for the rights of all persons in the United States.

We specifically urge Congress to:

- Request an investigation by the Inspector General on the Department of Justice's use of the material witness law since September 11.

- Renew its request to the Justice Department to inform Congress of the names, basis, and detention details of material witnesses since September 11.

We also urge Congress to amend the material witness law to:

- Heighten the standard for arresting and detaining a material witness. More than half of the state material witness laws have greater protections for witnesses, permitting such detention only if a witness has refused to guarantee that he or she will appear to testify at a scheduled proceeding.

- Limit the government's ability to hold a witness for a grand jury proceeding or trial to a specific, short period of time, such as five days, that would allow testimony to be taken but would not allow the statute to be abused for other purposes.

Congress should explicitly recognize rights for material witnesses, including: requiring the government to inform witnesses of the basis of their detention upon the arrest and providing a copy of the warrant; informing witnesses of their immediate right to a lawyer upon arrest; providing *Miranda*-type rights before any interrogation and comply with witnesses' requests for lawyers.

In addition, Congress should also require that material witnesses be detained in a separate detention center than criminal suspects and defendants and prohibit detention of witnesses in conditions of high security unless their specific and personal behavior in detention warrants it.

Expanding Extraterritorial Criminal Jurisdiction

Section 804 of the Patriot Act expands the "special maritime and territorial jurisdiction of the United States" to include a criminal offense by or against a United States national committed on the premises of any diplomatic, consular, military or other United States government mission or entity, or on a residence used for those purposes or used by personnel assigned to those missions or entities. Section 804 could be used as a basis for prosecuting terrorism crimes committed abroad, but is not limited to terrorism crimes.

Section 804 is part of a trend in increased extraterritorial application of American law. The federal criminal code now permits United States courts to try criminal defendants for a wide variety of crimes, including terrorism, war crimes, and other offenses, that are committed overseas and over which the federal courts traditionally have not had jurisdiction.

The ACLU does not object to the exercise of extraterritorial jurisdiction in cases of terrorism, war crimes, crimes against humanity or other grave offenses where there is a legitimate nexus to the United States, as is required by section 804. Indeed, the wide array of extraterritorial offenses calls into serious doubt any claim by the Bush administration that United States district courts are not the appropriate forum for terrorism trials.

For example, the 1998 trial of Al Qaeda terrorists implicated in the bombings of United States embassies in Africa resulted in convictions even though the crimes occurred overseas, much of the evidence had been obtained overseas in areas plagued by civil conflict, and much of the evidence involved classified information requiring the use of the special procedures of the Classified Information Procedures Act.

While the exercise of extraterritorial jurisdiction could be stretched too far, the United States district courts are clearly the right forum for the trial of terrorism suspects. The ACLU supports efforts by Congress and the Justice Department to bring terrorists to justice in the time-honored American way – through a criminal compliant alleging terrorism crimes in a federal district court bound by all the principles of the Bill of Rights.

The availability of extraterritorial jurisdiction for a wide array of serious crimes, and the successful use of the criminal courts to try and convict terrorism suspects in such cases, shows there is no reasonable excuse for the government's failure to provide justice in the case of so many it is now holding as "enemy combatants" without trial. It also calls into serious doubt the need for inadequate and second-class substitutes for a full and fair trial, such as the "military commissions" the Department of Defense has established.

Conclusion

This committee's review of the Patriot Act and related legal measures in the ongoing effort to combat terrorism is needed to ensure continued public support for the government's efforts to safeguard national security. The controversy over the Patriot Act reflects the concerns of millions of Americans for preserving our fundamental freedoms while safeguarding national security.

Resolutions affirming civil liberties have been passed in 383 communities in 43 states including seven state-wide resolutions. These communities represent approximately 61 million people. While these resolutions are often called anti-Patriot Act resolutions, they also take aim at other serious abuses of civil liberties, including the detention without charge of many Americans through a variety of pretexts such as the material witness laws.

A nationwide coalition under the banner "Patriots to Restore Checks and Balances" has formed under the leadership of former Congressman Bob Barr (R-GA), and includes groups as diverse as the ACLU, the American Conservative Union, the Free Congress Foundation, and Gun Owners of America.

Such widespread concern, across ideological lines, reflects the strong belief of Americans that security and liberty need not be competing values. As Congress considers renewal of the Patriot Act, we strongly urge this subcommittee to look beyond the expiring provisions to review other legal issues, both inside and out of the Patriot Act. Now is the time for Congress to restore basic checks and balances to Executive Branch powers.